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Sean Thomas Clark

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte SEAN THOMAS CLARK,
DEREK KEITH FRIEDMAN, and
TAMARA ANN CAHILL

Appeal 2007-2594
Application 10/687,130
Technology Center 3700

Decided¹: March 28, 2008

Before WILLIAM F. PATE, III, HUBERT C. LORIN, and
ANTON W. FETTING, *Administrative Patent Judges*.

LORIN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Sean Thomas Clark, et al. (Appellants) seek our review under 35 U.S.C. § 134 of the final rejection of claims 1 and 4-12. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

SUMMARY OF DECISION

¹ An oral hearing was conducted on January 23, 2008.

We AFFIRM.²

THE INVENTION

The Appellants' invention relates to "an interactive aide used to educate members of the public about childhood development." (Specification 1:19-20). Referring to Fig. 2, the apparatus 30 of the invention comprises a first area 38 and second area 39 that may resemble rooms in a house. Specification 8:31-32. Each area contains an interactive educational aide relating to childhood development. Specification 8:32-35. Fig. 3 shows examples of the aides.

First area 38 as shown in Fig. 3 may be provided with oversize furniture such as crib demonstration 44. The crib demonstration 44 shown allows adults (such as parents) to hold on to the "railing" of the crib demonstration 44 and get some perspective about what the bedroom looks like up from a babies['] perspective. Ideally, the crib demonstration 44 is sized so that it is about as proportionally big for an average sized adult as a real baby crib would be for an average sized baby at this stage of development. Similarly, other furniture such as a changing table and dresser 46 may also be provided. Once again, this furniture may be oversized so that it appears as big to an average sized adult as a typical dresser and changing table would appear to an average sized baby at this stage of development (relative to the size of the baby's body).

Specification 10:6-14.

Claims 1 and 12, reproduced below, are illustrative of the subject matter on appeal.

² We have considered the Final Rejection (mailed Jan. 13, 2006), Appellants' Appeal Brief ("App. Br.," filed Jul. 17, 2006), the Examiner's Answer ("Answer," mailed Oct. 13, 2006), and the Reply Brief ("Reply Br.," filed Nov. 13, 2006).

1. An educational apparatus comprising:
 - a. a structure divided into two or more areas wherein said structure comprises at least a first area and a second area,
 - b. a first three dimensional interactive educational aide, said first three dimensional interactive education aide being located in said first area,
 - c. a second three dimensional interactive educational aide, said second three dimensional interactive educational aide being located in said second area,
 - d. wherein said first three dimensional interactive educational aide when used by an adult user provides directly to said user a demonstration of an event or activity, said demonstration simulating the experience of a first child engaged in said event or activity, wherein said first child is in a first stage of child development, and
 - e. wherein said second three dimensional interactive aide when used by an adult user provides directly to said user a demonstration of an event or activity, said demonstration simulating the experience of a second child engaged in said event or activity, wherein said first stage of development and said second stage of development differ from one another.

12. An educational apparatus comprising a first three dimensional interactive educational aide, said first three dimensional interactive educational aide comprising labeling, indicia, or other insignia which communicates the correspondence of said first three dimensional interactive aides to a first stage of child development, and

a second three dimensional interactive educational aide, comprising labeling, indicia, or other insignia which communicates the correspondence of said second three dimensional interactive aide to a second stage of child development, wherein each of said first and said second three dimensional interactive educational aides provides information to an adult user relating to an aspect of child development said information corresponding to one of said first or said second stage of child development.

THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Yoon	US 6,168,495 B1	Jan. 2, 2001
Gibson	US 5,413,488	May 9, 1995
Stamm	US 2003/0118975 A1	Jun. 26, 2003

Broadlands Homeowners Association – crème de la crème in Sterling;
http://www.hoa.broadlands.org/forum/topic.asp?TOPIC_ID=256; post for June 17, 2003 [Broadlands].

The following rejections are before us for review:

1. Claims 1, 4-5, and 8-10 are rejected under 35 U.S.C. §102(b) as anticipated by Gibson.
2. Claim 12 is rejected under 35 U.S.C. §102(e) as anticipated by Stamm.
3. Claims 1, 4-7, 9, and 12 are rejected under 35 U.S.C. § 103(a) as unpatentable over Yoon.
4. Claims 1, 4, and 9-11 are rejected under 35 U.S.C. § 103(a) as unpatentable over Stamm and Broadlands.

ISSUES

The first issue before us is whether the Appellants have shown that the Examiner erred in rejecting claims 1, 4-5, and 8-10 as anticipated by Gibson.

The second issue before us is whether the Appellants have shown that the Examiner erred in rejecting claim 12 as anticipated by Stamm.

The third issue before us is whether the Appellants have shown that the Examiner erred in rejecting claims 1, 4-7, 9, and 12 as unpatentable over Yoon.

The fourth issue before us is whether the Appellant has shown that the Examiner erred in rejecting claims 1, 4, and 9-11 as unpatentable over Stamm and Broadlands.

A central question common to all these issues is whether the prior art shows or suggests a “demonstration simulating the experience of a [] child engaged in [an] event or activity, wherein said [] child is in a [] stage of child development” when used by an adult.

FINDINGS OF FACT

We find that the following enumerated findings are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

Claim construction

1. The Specification states that “[a]s used herein the term ‘interactive educational aide’ refers to any three dimensional device or apparatus

- which can provide educational information or an educational experience to adults regarding some aspect of the development of babies and young children.” Specification 10:29-32.
2. The Specification states that “[b]y ‘interactive’ it is meant that a user of the educational aide must perform some action or activity upon or with the device.” Specification 10:33-34.
 3. The Specification does not provide a definition for the claim term “experience” which is different from its customary and ordinary meaning.
 4. The customary and ordinary meaning of the term “experience” is “a) activity that includes training, observation of practice, and personal participation b) the period of such activity c) knowledge; skill, or practice resulting from this.” (*See Webster’s New World Dictionary* 997 (3rd Ed. 1988.)(Entry 5 for “experience.”)

The scope and content of the prior art

5. Gibson is directed to an educational structure. The structure “simulat[es] an actual item such as a fire truck ... that has a plurality of teaching stations each conveying a different aspect of learning to the child.” Col. 3, ll. 36-43.
6. Stamm relates to systems for promoting child development. [0001] Referring to Fig. 1, the system 100 comprises a housing 102, activity items 104, and instructional materials 106. [0020] “Activity items 104 may include any number of items with which a caregiver may engage in

an interactive play session with a child.” [0024] “In one embodiment, the particular activity items 104 included in any given system 100 are intended as examples to assist in teaching a caregiver a variety of ways in which to interact purposefully with a child and thereby encourage healthy early brain development in that child.” [0025] “In one embodiment, instructional materials 106 are designed to direct a caregiver in performing an activity with a child as well as provide a caregiver with an understanding of why the activity is beneficial to the child and how the type of activity enables the child to build skills that are related to future school skills.” [0029] “In an exemplary aspect, instructional materials 106 are designed to be used during an interactive session with a child at a particular age and stage.” [0030]

7. Yoon is directed to a portable child’s amusement and educational center in the form of a tent. Fig. 1. The center comprises interchangeable learning boards. Col. 4, ll. 26-50, Figs. 2-6.
8. Broadlands discloses an educational facility where “[t]hey split their infants into 4 rooms by age groups.” Page 4.

Any differences between the claimed subject matter and the prior art

9. The references do not expressly teach a “demonstration simulating the *experience* of a [] child engaged in [an] event or activity, wherein said []

child is in a [] stage of child development” when used by an adult (claim 1).

The level of skill in the art

10. Neither the Examiner nor Appellants has addressed the level of ordinary skill in the pertinent art of educational apparatuses. We will therefore consider the cited prior art as representative of the level of ordinary skill in the art. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001) (“[T]he absence of specific findings on the level of skill in the art does not give rise to reversible error ‘where the prior art itself reflects an appropriate level and a need for testimony is not shown’”) (Quoting *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed. Cir. 1985)).

Secondary considerations

11. There is no evidence on record of secondary considerations of non-obviousness for our consideration.

PRINCIPLES OF LAW

Claim construction

We determine the scope of the claims in patent applications not solely on the basis of the claim language, but upon giving claims their broadest reasonable construction in light of the specification as it would be interpreted by one of ordinary skill in the art. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004).

Anticipation

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 827 (1987).

Obviousness

“Section 103 forbids issuance of a patent when ‘the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.’” *KSR Int’l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1734 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, and (3) the level of skill in the art. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See also KSR*, 127 S.Ct. at 1734 (“While the sequence of these questions might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.”) The Court in *Graham* further noted that evidence of secondary considerations “might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.” 383 U.S. at 18.

ANALYSIS

Rejection of claims 1, 4-5, and 8-10 as anticipated by Gibson.

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The Appellants argued claims 1, 4-5, and 8-10 as a group (App. Br. 3). We select claim 1 (see *supra*) as the representative claim for this group, and the remaining claims 4-5 and 8-10 stand or fall with claim 1. 37 C.F.R. § 41.37(c)(1)(vii) (2007).

The Examiner found that Gibson discloses elements a.-c. of claim 1. According to the Examiner,

Gibson discloses an educational structure containing all of the elements of the claims including a structure divided into a first and second areas (figures 1-4, cab section 2 and toy chest area 9) as required by the claim 1, a first three dimensional interactive aide (steering wheel 4) as required by claim 1, a second three dimensional interactive aide (toys and books as described in col. 4, lines 56-58) as required by claim 1. A first interactive aide located in the first area and a second interactive aide located in the second area, as required by claim 1, is described in col. 4, lines 29-31 and lines 56-58, respectively.

Final Rejection 2 (incorporated at Answer 3).

With respect to elements d. and e., the Examiner argued that [w]ith respect to the two different stages of development, as broadly required by claim 1, Gibson's interactive aides encompass such features since to turn the steering wheel a user would have to be developing his/her muscles and coordination (considered to be part of a second stage of development), while to view the contents of a book the user would have to be developing his/her vision (considered to be part of first stage of development).

Final Rejection 2-3 (incorporated at Answer 3).

With respect to elements d. and e., the Appellants argued that the claim requires each of the two three dimensional interactive aides to provide a user a

demonstration “simulating the experience of a first child” when such structure is used by an adult. According to the Appellants

there is no disclosure pointed to in Gibson et al. that the steering wheel, books, or other toys simulate any experience of a child in a particular stage of development when such structures are used *by an adult*. These requirements and the structural implications of these requirements are positively recited in Claim 1 and must be considered during examination.

App. Br. 4 (Emphasis original). See also the Reply Br. 1-3.

The dispute is over whether or not the references show an apparatus simulating an *experience* of a child in a particular stage of development when it is used by an adult. The references disclose an adult and a child interacting with an educational object. The object does not change. Both the adult and the child interact with the same object, although the prior art suggests that the adult interacts with the object in a manner of behavior that will engage the child to interact with that object at a specific stage in the child’s development.

From the Appellants’ point of view, the references do not suggest the claimed invention because when the adult interacts with the object, the adult “experiences” the toy from the adult’s perspective and not, as the claim requires, from the child’s perspective. The Appellants’ underlying argument is that the claim term “experience” should be construed to limit the claimed apparatus to having a structure corresponding to a child’s physical frame of reference with an object at a certain stage of a child’s development, which physical frame of reference is to be regarded as relatively different from that of an adult with that same object.

We find that the Appellants unduly limit the scope of the claim. We find no definition in the Specification limiting the claim term “experience” to a term of physical relativity between child and adult. FF 3. Accordingly, the term is given its customary and ordinary meaning and that meaning is an “activity that includes training, observation of practice, and personal participation.” FF 4. Giving the claim term “experience” its customary and ordinary meaning would lead one of ordinary skill in the art to interpret the claim as reasonably broadly covering an apparatus with a structure that provides a “demonstration simulating the [activity that includes training, observation of practice, and personal participation] of a [] child engaged in [an] activity or event” when used by an adult.

Given this construction, the prior teaching of an object with which an adult interacts in a manner of behavior to engage a child to interact with that object reads on an apparatus with a structure that provides a “demonstration simulating the [activity that includes training, observation of practice, and personal participation] of a [] child engaged in [an] activity or event” when used by an adult. Accordingly, we find that the Examiner has presented a prima facie case of

anticipation and that the Appellants' argument³ based on construing the claimed apparatus as limited to a structure corresponding to child's physical frame of reference unduly limits the scope of the claim and is thus unpersuasive as to error in the rejection.

The Appellants also argued that the "Gibson et al. patent has not been shown to disclose first and second three dimensional interactive educational aides which simulate the experience of a first and second child in a first and second stage of development, respectively," App. Br. 6. We are unpersuaded by this argument. The question of whether Gibson reads on the claimed apparatus for providing a user a demonstration simulating the "experience" of child in whatever stage of development has been addressed *supra*. Gibson teaches "a plurality of teaching stations each conveying a different aspect of learning to the child." Col. 3, ll. 40-

³ During oral argument (see e.g., page 8 of the transcript), counsel for Appellants appeared to take the view that adults and children "experience" things differently and that given that difference the claim should be construed to limit the apparatus structure to reflect a child's relative "experience." Notwithstanding that we find that such a construction of the claim term "experience" unduly limiting the scope of the claim, construing the scope of the claim in the manner the Appellants advocate would raise a question of patentability on the ground of definiteness. Every patent specification must "conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." 35 U.S.C. § 112, ¶ 2 (2000). In that regard, relative "experiences," as the Appellants would have use define the term, are notoriously subjective. To read the claim as limiting the structure based on the subjective experience of a child would render the claim "not amenable to construction" and "insolubly ambiguous." *Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1347 (Fed. Cir. 2005). Claims containing a term that is "completely dependent on a person's subjective opinion" are indefinite. *Id.* at 1350.

43. This teaching reads on educational aides in a first and second stage of development. To the extent the Appellants are arguing that Gibson's stations do not reflect "stages" of child development in the sense that they do not reflect stages of maturity, we do not find, and the Appellants do not point to, anywhere in the Specification that limits the claim term "stage" to mean a level of maturity. That Gibson's stations are "stages" per se is clear and thus meets that aspect of the claimed apparatus.

Rejection of claim 12 as anticipated by Stamm.

The Examiner found that

Stamm discloses a system and method facilitating early childhood brain development which utilizes a number of educational aides (102) containing a number of activity items which relate to a specific stage of development (infant, baby, toddler, preschooler). Stamm further teaches that his educational aides are comprised of indicia which communicates the correspondence of the educational aides to the specific stage of development (figures 5-8).

Final Rejection 3-4.

The Appellants argued that

Stamm et al. has not been shown to disclose two or more three dimensional interactive educational aides which provide information to an *adult user* relating to an aspect of child development corresponding to a particular stage of development. At best Stamm et al. discloses instructions which generally provide information which may be read regarding childhood development. Such instruction sheets (such as those shown in Exhibit B, figures 5-8) are not three dimensional and are not interactive as those terms are used in the claim (see, e.g. the specification at page 10, line 33 – page 11, line 9).

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App. Br. 7. (Emphasis original).

We are not persuaded by the Appellants' argument. As the Examiner pointed out (Answer 6), Stamm teaches three dimensional kits acting as interactive educational aides with associated instructions (i.e., "activity cards") for a variety of stages of development. See para. [0020] and Figs. 5-8. Furthermore, Stamm's instructions refer to objects to be handled by a child at a specific stage of development. See [0136]. See also, e.g., Fig. 6: "plastic, cloth or sturdy, non-toxic board books are recommended ..." Accordingly, Stamm describes three dimensional interactive educational aides *comprising* "labeling ... which communicates the correspondence of said [] three dimensional interactive aides to a [] stages of child development" as claimed.

The Appellants also argued that "the cited disclosure of Figures 5-8 does not in fact provide evidence that the three dimensional interactive aides themselves are provided with common labeling, indicia or other insignia communicating their correspondence to a particular stage of child development. The cited figures merely describe activities that one could engage in using various supplies or items." App. Br. 7-8. While the Appellants correctly characterize the scope and content of Stamm, the broadest reasonable construction of claim 12 in light of the Specification as it would be interpreted by one of ordinary skill in the art is that it covers an apparatus comprising instructions corresponding to an associated three-dimensional interactive educational aide. The so-called supplies are used in the course of educating a child and are thus educational aides.

Rejection of claims 1, 4-7, 9, and 12 as unpatentable over Yoon.

Claims 1, 4-7, and 9

The Appellants argued claims 1, 4-7, and 9 as a group (App. Br.8-9). We select claim 1 as the representative claim for this group, and the remaining claims 4-7 and 9 stand or fall with claim 1. 37 C.F.R. § 41.37(c)(1)(vii) (2007).

The Examiner found that

Yoon discloses an educational structure containing all of the elements of the claims including a structure divided into a first and second areas (figures 9 and 10, tent and pocket 13, where the first area is read onto the pocket formed by the back section 15 and the front section 17 and the second area is read onto the sub-pocket assembly 40) as required by claim 1, a first three dimensional interactive aide (learning board 11) as required by claim 1, a second three dimensional interactive aide (balls 44) as required by claim 1. ... With respect to the two different stages of development, as broadly required by claim 1, it would have been obvious to one having ordinary skill in the art, at the time of the claimed invention, to have included educational aides directed to different stage[s] of development of children since Yoon clearly teaches that the three-dimensional interactive aides of his invention can be customized to children of a variety of ages and variety of educational needs (col. 4, lines 20-26 and lines 60-64).

Final Rejection 4-5.

The Appellants argued that

all of the discussion above with respect to Gibson et al. is equally applicable with respect to Yoon. Yoon merely discloses various toys and activities for children. These have not been shown to be claimed interactive aides which when used by an *adult simulate* the experience of a *child in a particular stage of development*.

App. Br. 9. (Emphasis original). The Appellants point out that the Examiner's position that, given Yoon's disclosure of three-dimensional interactive aides customizable to children of a variety of ages and variety of educational needs, it would have been obvious to include educational aides directed to different stages of development of children,

only provides motivation for providing toys, activities and the like geared toward *children* in different age groups. This is not the same as providing a series of interactive aides which *simulate to an adult* an experience of a child in *a series of different stages of development*, which is the invention of Claim 1.

App. Br. 9. (Emphasis original).

The Appellants' argument is the same as the one used in rebutting the rejection of claims 1, 4-5, and 8-10 as anticipated by Gibson. Accordingly, for the reasons we gave in finding the Appellants' arguments unpersuasive as to error in that rejection, we then equally unpersuasive as to error in this rejection.

Claim 12

Regarding claim 12, the Examiner found that "[a]n educational apparatus comprising two or more three dimensional interactive educational aides, as required by claim 12, is shown in figure 9 as board 11 and ball 44. The three dimensional educational aides being related by common labeling, indicia or other insignia, as required by claim 12, is described in col. 2, lines 52-60." Final Rejection 5.

The Appellants argued that

the Yoon patent does indeed disclose that the activity items can be provided with indicia relating such items as balls to other items such as learning boards. However, this disclosure does not suggest that such indicia, labeling, or insignia communicates the correspondence of the aides to a particular stage of child development (such as a first stage and a second stage) which is the requirement of Claim 12.

App. Br. 9-10.

We are not persuaded by this argument. The question is one of obviousness. As the Examiner has pointed out (Answer 7), Yoon discloses educational aides geared to children of a variety of ages (col. 4, ll. 20-26 and ll. 60-64). This would suggest to one of ordinary skill in the art educational aides to a variety of stages of child development, where the stages refer to different levels of maturity.

Rejection of claims 1, 4, and 9-11 as unpatentable over Stamm and Broadlands.

The Appellants argued claims 1, 4, and 9-11 as a group (App. Br. 10-11). We select claim 1 as the representative claim for this first group, and the remaining claims 4 and 9-11 stand or fall with claim 1. 37 C.F.R. § 41.37(c)(1)(vii) (2007).

The Appellants argued that

[e]ven granting Broadlands properly suggest modifying Stamm et al. to divide the structure into two or more areas, the basic failure of Stamm et al. to disclose the claimed interactive three dimensional educational aides having all of the claimed properties (as distinguished from three dimensional educational items generally) has not been remedied. In this regard, the arguments with respect to Ground of Rejection I pertaining to claim construction are equally applicable here.

App. Br. 11.

Accordingly, to rebut the instant rejection, the Appellants are relying on the arguments used to rebut the rejection of claims 1, 4-5, and 8-10 as anticipated by Gibson. Since we found the Appellants' arguments unpersuasive as to error in the rejection of claims 1, 4-5, and 8-10 as anticipated by Gibson, we then equally unpersuasive as to error in this rejection.

CONCLUSIONS OF LAW

We conclude the Appellant has failed to show that the Examiner erred in rejecting claims 1, 4, 5, and 8-10 under 35 U.S.C. §102(b) as anticipated by Gibson; claim 12 under 35 U.S.C. §102(e) as anticipated by Stamm; claims 1, 4-7, 9, and 12 under 35 U.S.C. § 103(a) as unpatentable over Yoon; and, claims 1, 4, and 9-11 under 35 U.S.C. § 103(a) as unpatentable over Stamm and Broadlands.

DECISION

The decision of the Examiner to reject claims 1, 4-12 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED

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PL Initials:

vsh

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